

Internal Revenue Service

memorandum

CC:TL-N-7833-88

Brl:CLRobertson, Jr.

date: SEP 9 1988

to: District Counsel, Detroit CC:DET
Attention: S. Todd Hittinger

from: Director, Tax Litigation Division CC:TL

subject: 30-Day Letter Procedures and I.R.C. § 7430
Awarding of Court Costs and Certain Fees

This is in response to your request for technical advice dated July 6, 1988, on the present 30-day letter procedures for cases which have a statute expiring in less than six months.

ISSUES

(1) Whether the Service should issue 30-day letters if the statute will expire in less than six months. 7430-0000

(2) Whether there should be a special 30-day letter for cases which have an imminent statute. 7430-0000

(3) Whether for multiple year cases which have only one year with a short statute of limitations the Service should separate the short statute year from the other years so that an Appeals office conference may be offered on at least part of the case. 7430-0000

CONCLUSION

There are no legal impediments to use of a special 30-day letter in the situations described above. However, use of such a letter will require coordination and approval by affected functions within the Service so that any administrative considerations may be resolved.

FACTS

A problem has been identified by the Chief, Examination Division, Detroit District Director, with cases in which the statute of limitations will expire in less than six months. There is a high probability that the taxpayer will not have an opportunity to exhaust administrative remedies within the Service because insufficient time remains on the statute to permit Appeals office consideration.

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DISCUSSION

The Tax Court held in Minahan v. Commissioner, 88 T.C. 492 (1987), that Treas. Reg. § 301.7430-1(b)(1)(i)(b) and Treas. Reg. § 301.7430-1(f)(2)(i) are invalid to the extent that as a prerequisite to recovery of litigation costs under section 7430 they require taxpayers to extend the statute of limitations to allow a reasonable period of time for an Appeals office conference. These regulations generally require a taxpayer to consent to an extension of the statute of limitations to allow sufficient time for handling of the case in an Appeals conference. Without the extension the taxpayer would not be deemed under the regulations to have exhausted his administrative remedies. Although the Service has not published the action on decision in Minahan, it has been determined that we will acquiesce in that decision. Thus, the Service will refrain from making arguments under section 7430 that a taxpayer has not exhausted his administrative remedies based on the fact that the taxpayer refused to extend the applicable statute of limitations.

As a result of Minahan there is uncertainty as to the proper procedure to minimize litigation costs awards under section 7430 in cases where the taxpayer refuses to extend the statute of limitations and there is insufficient time to process the case through the Appeals conference. Telephone discussions on August 15, 1988, with the Chief, Quality Review Staff, Detroit District, out of which office the initial inquiry arose, indicate there is a concern that the Tax Court was criticizing the Service for not making an Appeals office conference available to the taxpayer in Minahan.

As was discussed in these telephone conversations, Minahan involved a taxpayer who did not receive a 30-day letter offering an Appeals conference because the taxpayer would not consent to extend the statute of limitations to allow sufficient time for the Appeals office to consider the case as required under the above referenced Treasury regulations. Therefore, the taxpayer did not participate in an Appeals conference before filing a petition in the Tax Court. In our view the court was not focussing on the Service's failure to provide an Appeals conference. Rather, the court rejected the Service's authority under the specific language of section 7430 to promulgate regulations which required the taxpayer to extend the statute of limitations to allow a reasonable period of time for Appeals' consideration. The effect of this holding is to permit the taxpayer in this situation to validly claim for section 7430 purposes that he has exhausted all "available" administrative remedies even when he has refused to extend the statute of limitations to allow ample time for a 30-day letter to be issued and an Appeals conference to be held.

Your technical advice request notes that IRM 4461.7(2) (Precautions Against Expiration of Limitation Period) requires at least 120 days remaining on the statute before a case can be transmitted to Appeals. If a consent to extend the statute is not received, a statutory notice of deficiency must be issued to protect the government's interest. As discussed in the August 15 telephone conversation mentioned above, it appears that this administrative rule was adopted based on practical considerations, i.e., 120 days is probably the minimum period of time considering the general workload of Appeals to process a case through the Appeals level. With respect to issue one, whether 30-day letters should be issued when there are fewer than 6 months remaining, we would advise that you follow the guidance already established in IRM 4461.7(2). Under issue one you note your specific concern that although issuance of 30-day letters in this situation would document the Service's offer of an Appeals conference, there would be instances when the taxpayer desires to go to Appeals, but there is insufficient time remaining for Appeals to accept the case. If the taxpayer truly desires to participate in an Appeals conference before litigating there is nothing in Minahan which precludes the Service from requesting that the taxpayer consent to extending the statute to accommodate this desire to participate in an Appeals conference which could then be made available to him within the time constraints of IRM 4461.7(2). However, as noted above under Minahan failure to so consent would not preclude eligibility for an award under section 7430.

With respect to issue two, whether there should be a special 30-day letter for cases which have an imminent statute, we would advise that Minahan does not prevent a taxpayer from executing a consent to extend the statute of limitations. Rather, Minahan holds that the Service cannot require the consent for the taxpayer in this situation to preserve his claim for litigation costs. In our view, therefore, the Service could so draft the language of a 30-day letter to clarify in situations where the statute is imminent (for example, in issue one where there are fewer than six months left before the statute of limitations expires) that: (1) the taxpayer has exhausted all available administrative remedies, but that (2) if the taxpayer desires an Appeals conference before filing a petition in the Tax Court, such a conference can be made available if an appropriate consent is executed to allow sufficient time for


Appeals consideration. This assumes that any other basis for asserting that the taxpayer had not exhausted available administrative remedies does not exist.

With respect to issue three, whether, in multiple year cases that have one year with an imminent statute problem, the short year may be separated from those years without statute problems, we do not see that there is any legal impediment to treating any of the multiple years separately. The approach outlined above under issue two would therefore apply. However, the Service will have to determine whether the administrative convenience of handling multiple years in a combined fashion outweighs separating the short year for this purpose.

While we do not see any legal impediments to drafting a special 30 day letter as outlined above, the specific language and use of such a letter may involve administrative considerations principally in the Appeals and Examination functions. Therefore, this letter and necessary changes to procedures in the Internal Revenue Manual should be formally coordinated with all affected functions of the Service before its use in imminent statute of limitations cases as described above.

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